A

SEAH CHEOH WAH

v.

MALAYAN BANKING BHD & ANOR

B

HIGH COURT MALAYA, JOHOR BAHRU
AZAHAR MOHAMED J
[CIVIL SUIT NO: 22-531-2002]
10 NOVEMBER 2008

C ***CIVIL PROCEDURE:*** *Administration of estates - Action for declaration - Housing loan facility - Borang Cadangan Pelan Tafakul Gadaijanji (MRTAP form) - Application for declaration that MRTAP in favour of deceased to pay off balance of housing loan facility - Whether by acceptance of premium vide official receipt issued MRTAP deemed in*
D *force - Whether non-payment by second defendant would amount to breach of contract - Whether plaintiff's claim against second defendant allowed*

CONTRACT: *Breach - Negligence - Allegation of - Housing loan facility - Whether first defendant fulfilled its contractual duty to obtain Borang Cadangan Pelan Takaful Gadaijanji (MRTAP form) by paying*
E *sum of RM24,062 to second defendant as premium - Whether contract of assurance concluded - Whether plaintiff failed to establish case against first defendant*

The deceased had purchased a property ('the property') at a cost
F of RM470,000. The deceased paid a sum of RM47,000 as deposit and part payment of the purchase price. He then took a loan from Malayan Banking Berhad (the first defendant) in order to settle the balance of the purchase price. The first defendant had offered Al Bai Bithaman Ajil (BBA) Housing Loan Facility to the deceased
G for a sum of RM423,000. Pursuant thereto, the first defendant forwarded to Syarikat Takaful Malaysia Sdn Bhd (the second defendant) the Borang Cadangan Pelan Takaful Gadaijanji (the MRTAP form) duly completed and signed by the deceased and a banker's cheque of RM24,062 for the payment of premium for a
H Mortgage Redemption Terms Assurance Policy (MRTAP) which sum was added to the housing loan. In essence, a valid and enforceable MRTAP provides an assurance that the outstanding balance of the housing loan will be settled in full upon the untimely death or total and permanent disability of the deceased.
I The second defendant issued an official receipt of the acceptance of the premium in the sum of RM24,062 *vide* official receipt dated 24 June 1997. Sadly, the deceased passed away on 29 December

1997. However, the second defendant refused to pay off the outstanding housing loan taken by the deceased from the first defendant for the reason that no policy was as yet given out. The plaintiff, as the court appointed receiver and manager as well as the administrator to administer the estate of the deceased, brought this action against both the first and second defendants. The plaintiff's claim against the second defendant was for (a) a declaration that the second defendant had issued a MRTAP in favour of the deceased to pay off the balance BBA Housing Loan facility taken by the deceased from the first defendant for financing the purchase of the property; (b) that the second defendant also pay the first defendant under the MRTAP all the money including interest charges whatsoever due and outstanding in respect of the BBA Housing Loan Facility taken by the deceased from the first defendant with the property as security. As for the plaintiff's claims against the first defendant, the question arose as to whether the first defendant had breached any contractual duty or was negligent in the application for the MRTAP by the deceased and the release of the sum RM24,062 to the second defendant being the premium for the MRTAP.

Held (allowing plaintiff's claim against the second defendant; dismissing plaintiff's claim against first defendant):

(1) The core question to be decided in this action was whether or not by the acceptance of the premium in the sum of RM24,062 *vide* official receipt dated 24 June 1997, issued by the second defendant, the MRTAP was in force or deemed to be in force. The answer to the question revolved around two important documents, namely the MRTA form and the official receipt issued by the second defendant for the sum of RM24,062 which was paid by the first plaintiff as premium for the MRTAP. From these two documents, a very important fact that could not be overlooked was the absence of a declaration that the MRTAP shall not take effect unless and until a policy had been issued. And on top of all this, it was important to keep in mind that until today, the premium of RM24,062 was never refunded by the second defendant to the first defendant or to the estate of the plaintiff. The acceptance of the premium was incontrovertibly a benefit to the second defendant. (paras 4 & 5)

(2) The MRTA form and the official receipt did not in any way subject the deceased to a medical check up before the issuance of the MRTAP. The requirement for a medical examination was imposed after the contract of assurance had come into force. The requirement could not be viewed as a term of the contract. Therefore, based on the facts as presented in the present case and under the circumstances, there was a contract of assurance concluded when the second defendant accepted payment of the premium from the first defendant on 24 June 1997. The requirement for the deceased to undergo a medical check up was made after the contract had been concluded. Therefore, the non-payment by the second defendant in respect of the benefit under the MRTAP would amount to a breach of the contract. (para 8)

(3) There was no disagreement over the fact that the first defendant had paid the sum of RM24,062 to the second defendant as premium for the MRTAP. Moreover, the second defendant had issued an official receipt. There was a contract of assurance concluded when the second defendant accepted payment of the premium on 24 June 1997. As a matter of fact, the first defendant had fulfilled its contractual duty to obtain the MRTAP on behalf of the deceased. The plaintiff had failed to establish a case against the first defendant as the plaintiff's witnesses have failed to adduce any evidence that the first defendant had breached any contractual duty and/or was negligent in the application for the MRTAP and the release of the sum of RM24,062 to the second defendant being the premium for the MRTAP. (para 19)

Case(s) referred to:

Borhanuddin Jantara & Anor v. American International Assurance Co Ltd [1986] 1 CLJ 532; [1986] CLJ (Rep) 73 CA ***(refd)***

Chong Khee Sang v. Pang Ah Chee [1983] 1 LNS 57 HC ***(refd)***

Jaafar Shaari & Siti Jama Hshim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 101, 102

For the plaintiff - KH Tan (LK Ng with him); M/s E Ramasamy & Co

For the 1st defendant - Leney Andrew Albert (Norliah Tahir with him); M/s Syed Alwi, Ng & David Chong

For the 2nd defendant - Tabian Tahir; M/s Talbian Tahir & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Azahar Mohamed J:

[1] On 18 May 1997, Ramarajan a/l Suriyakanan (the deceased) purchased a property held under HS(D) 260 169 Lot PTD 75636 Mukim Pulai, District of Johor Bahru (the property), at a cost of RM470,000. The deceased paid a sum of RM47,000 as deposit and part payment of the purchase price. He then took a loan from Malayan Banking Berhad, (the 1st defendant) in order to settle the balance of the purchase price. The 1st defendant had offered Al Bai Bithaman Ajil (BBA) Housing Loan facility to the deceased for a sum of RM423,000 *vide* letter of offer dated 7 March 1997. Pursuant thereto, on 18 June 1997, the 1st defendant forwarded to Syarikat Takaful Malaysia Sdn Bhd (the 2nd defendant) the Borang Cadangan Pelan Takaful Gadaijanji (the MRTA form) duly completed and signed by the deceased and a banker's cheque of RM24,062 for the payment of premium for a Mortgage Redemption Terms Assurance Policy (MRTAP) which sum was added to the housing loan.

[2] In essence a valid and enforceable MRTAP provides an assurance that the outstanding balance of the housing loan will be settled in full upon the untimely death or total and permanent disability of the deceased. The 2nd defendant issued an official receipt of the acceptance of the premium in the sum of RM24,062 *vide* official receipt dated 24 June 1997. Sadly, the deceased passed away on 29 December 1997. However, the 2nd defendant refused to pay off the outstanding housing loan taken by the deceased from the 1st defendant for the reason that no policy was as yet given out. Unhappy with the negative response, understandably the plaintiff then brought this action against both the 1st and 2nd defendants. The plaintiff is the court appointed receiver and manager as well as the administrator to administer the estate of the deceased.

[3] On that note, I think it will be convenient if I first deal with the plaintiff's claim against the 2nd defendant. The plaintiff's claim against the 2nd defendant is for the following orders:

a) for a declaration that the 2nd defendant has issued or deemed to have issued a MRTAP in favour of the deceased to pay off the balance BBA Housing Loan facility taken by the deceased from the 1st defendant for financing the purchase of the property.

A b) That the 2nd defendant also pay the 1st defendant under the MRTAP all the money including, interest, charges whatsoever due and outstanding in respect of the BBA Housing Loan Facility (Loan Account No: 4-51137-711213) taken by the deceased from the 1st defendant with the property as security.

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[4] Having stated the background facts, in my view the core question to be decided in this action is whether or not by the acceptance of the premium in the sun of RM24,062 *vide* official receipt dated 24 June 1997, issued by the 2nd defendant, the C MRTAP is in force or deemed to be in force. To my mind the answer to the question revolves around two important documents, namely the MRTA form and the official receipt no. 0235432 issued by the 2nd defendant for the sum of RM24,062 which was paid by the 1st plaintiff as premium for the MRTAP.

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[5] Learned counsel for the plaintiff submitted that the contract of assurance had come into force when the premium was accepted by the 2nd defendant. In my view there is merit in his argument. From these two documents a very important fact that cannot be E overlooked is the absence of a declaration that the MRTAP will only be issued and/or be in force only after the deceased have undergone a medical check-up. The significance also lies in the absence of a declaration that the MRTAP shall not take effect unless and until a policy has been issued. And on top of all this, it is important to keep in mind that until to-day the premium of F RM24,062 was never refunded by the 2nd defendant to the 1st defendant or to the estate of the plaintiff. To my mind the acceptance of the premium is incontrovertibly a benefit to the 2nd defendant.

G **[6]** On the other hand, learned counsel for the 2nd defendant argued that the deceased had to undergo a medical examination before the issuance of the policy. But some crucial facts require to be kept in mind. The MRTA form was submitted on 18 June 1997. Bearing in mind that the official receipt for the premium H paid was issued on 24 June 1997, the deceased was then requested by the 2nd defendant *vide* a letter dated 10 July 1997, to undergo a medical examination. Notice that the letter is dated 10 July 1997, well after the 2nd defendant accepted the premium.

I **[7]** In this context the authority that I would like to refer is the case of *Borhanuddin Jantara & Anor v. American International Assurance Co Ltd* [1986] 1 CLJ 532; [1986] CLJ (Rep) 73. There, the deceased was one of the victims of the MAS flight no. MH

653 which crashed at Tanjong Kupang, Johor on 4 December 1977. About two weeks before the crash, on 21 November 1977, the deceased submitted a proposal form duly completed and signed by her to the respondents (insurance company) to insure her life for a sum of $50,000 with an additional accident benefit of another sum of $50,000. On 2 December 1977, the deceased paid to the insurance company a cash sum of $113 and a receipt was issued by the insurance company. The insurance company did not issue a policy number to the deceased although an allotted number was carried in the proposal form and receipt. The estate of the deceased sued the insurance company for the assured sums when the latter refused to pay. The insurance company contended that there was no concluded contract since no policy was as yet issued or delivered. In reply, the estate of the deceased contended that the deceased's proposal was accepted by the insurance company when the payment of $118 was accepted. VC George J agreed with the submission of the insurance company on the construction of the terms in the proposal form and the receipt. The estate of the deceased then appealed to the Supreme Court. Salleh Abas LP in the course of his judgment had this to say at p. 76:

> In this situation the law will not allow the respondent to escape liability by refusing to perform their obligation. In our view the contention by counsel for the appellants is well founded in that there was a contract of assurance concluded when the respondent a accepted payment of the premium from the deceased on 2/12/1977 and by refusing to make payment of the assured sums the respondents were acting in breach of the contract.

[8] In the present case, the MRTA form and the official receipt did not in any way subject the deceased to a medical check-up before the issuance of the MRTAP. To my mind the requirement for a medical examination was imposed after the contract of assurance had come into force. The requirement cannot be viewed as a term of the contract. Therefore, based on the facts as presented in the present case and under the circumstances there was a contract of assurance concluded when the 2nd defendant accepted payment of the premium from the 1st defendant on 24 June 1997. The evidence points to this: the requirement for the deceased to undergo a medical check-up was made after the contract had been concluded. Therefore, the non payment by the 2nd defendant in respect of the benefit under the MRTAP would amount to a breach of the contract.

[9] Now I shall deal with the plaintiff's claim against the 1st defendant. The plaintiff's claims against the 1st defendant are for its alleged breach of contractual duties and/or negligence in its conduct the particulars of which are stated at para. 16 and 17 of the statement of claim.

[10] I should mention here that on 14 December 2006, when this matter came up for continued hearing and after the plaintiff had closed his case learned counsel for the 1st defendant submitted that the 1st defendant had no case to answer; the 1st defendant elected not to call any witnesses. He argued that since the evidence adduced by the plaintiff did not establish any case in law for the 1st defendant to answer, the court should dismiss the case against the 1st defendant. On 23 February 2007, I made the following ruling:

> This is my ruling in respect of the 1st defendant's submission of no case to answer. In my view, whether the 1st defendant is wholly absolved or wholly or partly liable in this case can only be decided after I have heard all the evidence in this case and that would mean considering also the evidence adduced by the 2nd defendant.

[11] With that, the question arises: whether the 1st defendant had breached any contractual duty and/or was negligent in the application for the MRTAP by the deceased and the release of the sum of RM24,062 to the 2nd defendant being the premium for the MRTAP.

[12] In the first place, learned counsel for the plaintiff in his submissions has drawn to my attention to pp, 10 to 19 of the agreed bundle of documents (bundle 'B'), which is the letter of offer for the housing loan approved by the 1st defendant to the deceased. At p. 12 of bundle B is the terms and conditions of the loan and at the second paragraph of cl. 1 it is stated:

> Bahawa satu polisi 'Mortgage Reducing Term Assurance' akan diambil oleh Bank bagi pihak tuan daripada Syarikat Takaful, Premiumnya akan ditanggung oleh Tuan.

[13] In relation to the above, learned counsel argued that the clause clearly and without any ambiguity puts the burden of obtaining the MRTAP squarely on the 1st defendant. He argued that when the 1st defendant elected not to call evidence, then all the evidence led by the plaintiff must be assumed to be true. He

has also drawn to my attention to p. 126 of bundle B which is a letter dated 10 February 1998 from the 1st defendant to the plaintiff's solicitors and at para. (d) it is stated:

> Yes. Mortgage assurance taken is under Takaful Policy No: CJ 0100000143. Kindly request Madam Soo Chow Yin the lawful widow of the deceased to call upon m/s Takaful Malaysia Sdn. Bhd. of No. 16, Tingkat 3, Jalan Meldrum, 80000 Johor Bahru. The person in charge is Encik Khairul Annwar ...

[14] Learned counsel for the plaintiff contended that from these documents, the plaintiff has established by the 1st defendant own documents that:

(i) The 1st defendant will obtain the MRTAP on behalf of the deceased.

(ii) The 1st defendant informed the plaintiff's solicitors that the 1st defendant had obtained the said MRTAP No: CJ 0100000143.

[15] As a final point, it is the submission of learned counsel for the plaintiff that when the 2nd defendant was not willing to issue the MRTAP, the 1st defendant had breached the terms and conditions as contained in the 1st defendant's own letter of offer.

[16] In my view the submissions of the plaintiffs learned counsel are not free from difficulties. I dismissed them for the following reasons. For one thing, the burden is at all times borne by the plaintiff to prove his case on the balance of probability. It is something that we all know but I would take this opportunity to emphasize it. Section 101 of the Evidence Act 1950 says that the person who asserts the existence of any fact must prove the fact exists. Section 102 then said the burden of proof in a suit lies on that person who would fail if no evidence at all was given on either side. The 1st defendant does not owe any duty to the plaintiff to call any witnesses to prove the plaintiff's case. In this regard, I agree with the submissions of learned counsel for the 1st defendant that despite the fact that the plaintiff need not prove the existence or execution of the documents in the agreed bundle of documents, that is to say bundle B, there is still the requirement to tender the documents and prove the truth of the same. The principle of law is well explained in the case of *Chong Khee Sang v. Pang Ah Chee* [1983] 1 LNS 57 where Shankar J (as he then was) had this to say:

A document does not become admissible in evidence merely because it has been handed to the adjudicating officer and marked as exhibit. Documents put in evidence were to be marked as exhibits and retained by the court. But what has not been specifically stated and should be understood by all concerned is that a document cannot be admitted into evidence and marked as such until it has been properly proved.

And further down His Lordship put in plain words that:

... Certainly the law must be that once a document is included in an Agreed Bundle, it is no longer necessary to prove their existence or execution. Nor is it necessary to produce the original. But so far as the contents of the documents are concerned the truth of the same has still to be proved, in the absence of any specific admission of the facts therein contained.

[17] Again in the case of *Jaafar Shaari & Siti Jama Hshim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 Peh Swee Chin FCJ laid down the following principles:

First and foremost, the agreed bundle of documents means that the documents therein are authentic and they do exist, therefore they require no proof of their authenticity by calling eg, their makers.

Secondly, the truth of contents of any of the documents in the agreed bundle of documents is always not admitted unless the contrary is indicated directly or indirectly and such truth of such contents is liable to be challenged in court at the instance of either of the parties.

Thirdly, such documents therein do not form automatically a part of the evidence of the case in question *ipso facto*, but any of such documents does become part of such evidence if it is read or referred to by either of the parties, wholly or partly, at length or in a briefest of mention, either in examination of any witness, in submission at any stage or even on any unilateral drawing of court's attention to it by either of the parties at any time before the conclusion of the case.

Fourthly, at the end of the whole case, the truth of the contents of any of the document is up to the court to determine, regard being had, *inter alia*, to any absence of challenge by either of the parties on any part of the document and similarly, the question of weight, eg, either great or no weight to be given to any part of any document is also a matter for the trial court, which considers

the documents including any "written hearsay" contained therein. The court may refuse to give any weight at all to any document, but then it is accountable like in other matters, to the parties and to the appellate for reasons for such refusal.

[18] Returning to our present case and applying the foregoing principles I agree with the arguments of learned counsel for the 1st defendant that I should not consider the two documents relied on by learned counsel for the plaintiff in bundle B which had not been admitted into evidence and marked as such and for that reason had not been properly proved in court.

[19] In any event there's no disagreement over the fact that the 1st defendant had paid the sum of RM24,062 to the 2nd defendant as premium for the MRTAP. Moreover, the 2nd defendant had issued an official receipt *vide* receipt no. KK288805. And as I have said earlier there was a contract of assurance concluded when the 2nd defendant accepted payment of the premium on 24 June 1997. In this way, as a matter of fact the 1st defendant had fulfilled its contractual duty to obtain the MRTAP on behalf of the deceased. This being the case, the plaintiff has failed to establish a case against the 1st defendant as the plaintiff's witnesses have failed to adduce any evidence that the 1st defendant had breached any contractual duty and/or was negligent in the application for the MRTAP and the release of the sum of RM24,062 to the 2nd defendant being the premium for the MRTAP.

[20] Therefore, to sum it up, based on all the aforesaid reasons, I would allow the plaintiff's claim against the 2nd defendant. I would make an order in terms to the plaintiff's statement of claim; para. 20(a)(b) and (f).

[21] The plaintiff's claim against the 1st defendant is hereby dismissed with costs.